PRIVY COUNCIL REPORTS

K. RATNASINGAM v. KOW AH DEK & ANOR.

[P.C. Lord Fraser of Tullybelton, Lord Keith of Kinkel, Lord Scarman, Lord Bridge of Harwich and Lord Templeman) May 18 & 19; July 18, 1983]
[Privy Council Appeal No. 4 of 1982]

Tort – Negligence – Damages for loss of future earnings – Loss of post-retirement earnings.

Practice and Procedure – Appeal regarding damages – Delay in disposal of case – Privy Council entitled to make their own assessment.

This was an appeal from the decision of the Federal Court reported at [1981] 2 M.L.J. 24. The appellant had been injured in a road accident and suffered minimal brain damage. Liability was admitted and the only issue was damages. The learned trial judge made awards as follows:–

(a) For pain, suffering and loss of amenities of life	$ 70,000.00
(b) Loss of future earnings up to retirement	$112,722.80
(c) Loss of future earnings after retirement	$ 60,908.00
(d) Loss of gratuity	$ 10,000.00
(e) Special damages for transport	$ 500.00
	$254,130.80

On appeal, the Federal Court upheld the award of general damages for pain, suffering and loss of amenities of life, and of special damages. They made no award for loss of earnings up to date of retirement but in respect of earnings after retirement, they awarded a sum of $31,172.23. Their substituted award was as follows:–

(a) General damages for pain, Suffering and loss of amenities of life	$ 70,000.00
(b) Loss of future earnings prior to retirement	Nil
(c) Loss of future earnings after retirement	$ 31,172.23
(d) Loss of gratuity	Nil
(e) Special damages	$ 500.00
	$101,672.23

The Federal Court held that the assessment of loss of future earnings by the learned judge which was based on the difference between the respondent's existing salary and that he would get as a Superscale G (on his passing the Bahasa Malaysia examinations) was untenable.

Held: (1) in this case the time taken to hear the case from close of pleadings to judgement was a period of 4 years 9 months. Such delay was totally unacceptable and whatever the reason for it, it was a substantial obstacle in the way of justice;

(2) where as in this case the achievement of finality in a protracted litigation became one of the priorities if justice is to be done, the Privy Council, if satisfied as to the error of the award from which the appeal is brought, will not be deterred from making their own assessment of damages unless it can be demonstrated, which was not the case here, that they did not have all the material or the knowledge of the circumstances to reach a reasonable and just conclusion;

(3) the Federal Court's view that a promotion to superscale G was not even a possibility at the time of the accident could not be sustained in the light of the judge's finding of the prospects of the appellant's passing his examinations. The Federal Court was right in holding the period of 13 years as the period of loss was too long. One-third of the judge's award would therefore be reasonable and the Privy Council assessed the loss at $37,600.00;

(4) the Federal Court's figure for loss of post-retirement benefits was not unreasonable, even if account be taken, contrary to the Federal Court's view, of a possible loss of some pension and gratuity as well as of a job. There would be no justification therefore for interfering with the Federal Court's figure for this item of loss.

Cases referred to:–

(1) *Selvanayagam* v. *University of the West Indies* [1983] 1 W.L.R. 585; 1 All E.R. 824.
(2) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Eugene Cotran for the appellant.
Nigel Murray (*Ian Kellow* with him) for the respondent.

Cur. Adv. Vult.

Lord Scarman (delivering the judgment of the Board): This is a plaintiff's appeal as to the quantum of damages in a personal injuries case from a decision by the Federal Court of Malaysia allowing the defendants' appeal from an award made in the High Court in Malaya by Ajaib Singh J.

On May 4, 1973 the appellant suffered serious personal injury in a road accident. On September 16, 1974 he issued his writ, claiming damages. It was accompanied by a statement of claim in which he alleged negligence against the two respondents (the driver and owner respectively of the vehicle with which he was in collision), and in which he claimed damages for (amongst other items) loss of the opportunity of promotion in the teaching profession. The respondents delivered their defence on November 5, 1974. There was no further pleading. Subject to a few matters which commonly arise in litigation of this class, the case was then ready for trial.

But the course of the litigation developed thereafter a most disturbing pattern of delay and interruption. The trial opened on December 4, 1975 (13 months after close of pleadings). Liability was now for the first time admitted, damages alone being left in issue. On that day the appellant called a number of witnesses. The trial then stood over for 9 months until September 14, 1976, when the appellant called a fourth witness. It was then adjourned to 7th and 8th December 1976, but it would appear from the Record of Proceedings that it was not resumed until January 24, 1978 – some 16 months later – when he called a further witness.

The pattern of a delayed and broken trial persisted. There were hearings on September 27, 1978 (8 months later): and on June 26, 1979 (9 months on). At last on August 10, 1979 (6 weeks on), the appellant closed his case, the respondents elected to call no evidence, submissions were made, and the judge announced his award of damages.

The respondents appealed, and on January 13, 1981 the Federal Court reduced the award. The appellant now appeals to the Judicial Committee.

The time taken to hear and determine this simple, straightforward case, from close of pleadings to judgment, was a period of 4 years 9 months. In their Lordships' view such delay is totally unacceptable. Whatever the reason for it, it was a substantial obstacle in the way of justice.

After such a start – for alas, when the suceeding time spent on proceeding through two courts of appeal is added on, that is what the time spent on trial was – it is no cause for surprise if error has crept in either at first instance, as the respondents alleged in the Federal Court, or on appeal, as the appellant alleges in his appeal to this Board.

Their Lordships stress the unacceptable factor of delay and interruption in the trial process because it has significance in their disposal of the appeal. The issue is as to the amount of damages to be awarded. Even if the appellant should succeed in establishing error on the part of the Federal Court, he may not succeed in reinstating the award of the trial judge. If this should be the outcome of the appeal, the respondents submit that the issue of damages should be remitted, but not decided by their Lordships.

Their Lordships recognise that, in appeals as to the quantum of damages where error has been shown, it is often the better course to remit the question to the determination of the courts of the country of origin: a recent example is to be found in the Trinidadian case, *Selvanayagam* v. *University of the West Indies*[1]

But there are cases where the evidence does enable the Board to reach a reasonable assessment. The Malaysian case, *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.*[2] was such a case. In that case the Board was able to substitute its own assessment of general damages for personal injury for that of the court below without departing from the principles which have always guided the Judicial Committee in this class of case. They were succinctly stated by Lord Morris of Borth-y-Gest, giving the opinion of the Board in that case, at page 465:–

> "In deciding this appeal their Lordships think that three considerations may be had in mind: (1) That the law as to the factors which must be weighed and taken into account in assessing damages is in general the same as the law in England. (2) That the principles governing and defining the approach of an appellate court that is invited to hold that damages should be increased or reduced are the same as those of the law in England. (3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social economic and industrial conditions exist."

When, as in the case now under consideration by their Lordships, the achievement of finality in a protracted and interrupted litigation becomes one of the priorities if justice is to be done, their Lordships, if satisfied as to error in the award by the court from which the appeal is brought, will not be deterred from making their own assessment of damages unless it can be demonstrated that they do not have the material or the knowledge of the circumstances to reach a reasonable and just conclusion. The appellant was injured 10 years ago. Justice any longer delayed will be justice denied. And their Lordships do not doubt that all the relevant factors bearing on the issue are now known. If, therefore, the need arises, their Lordships are in a position to make their own assessments and will do so.

The trial judge awarded the appellant damages in a total sum of $254,130.80 and interest. The

award was itemised as follows:–

(a) General damages	$ 70,000.00
(b) Loss of future earnings prior to retirement	112,722.80
(c) Loss of future earnings after retirement	60,908.00
(d) Loss of gratuity	10,000.00
(e) Special damages for transport	500.00
Total	$254,130.80

He ordered interest on the general damages of $70,000 at 6% p.a. from date of service of writ.

On appeal the Federal Court upheld the award of general damages and of special damages but allowed the appeal in respect of loss of future earnings. They made no award for loss of earnings up to date of retirement: but in respect of earnings expected after retirement they awarded a sum of $31,172.23. They disallowed the $10,000 award for loss of gratuity. Accordingly, their substituted award (using the trial judge's itemisation) was:–

(a) General damages	$ 70,000.00
(b) Loss of future earnings prior to retirement	nil
(c) Loss of future earnings after retirement	31,172.23
(d) Loss of gratuity	nil
(e) Special damages	500.00
Total	$101,672.23

The Court ordered interest at 6% p.a. on the general damages from the date of issue of the writ and interest at 4% p.a. on their award for loss of future earnings and on the special damages from date of judgment.

The only question remaining in dispute is as to the award in respect of the loss of future earnings. At the date of his accident the appellant was 37 years old. He was a man of considerable distinction. When he left school in Kuala Lumpur, his teachers gave him a glowing testimonial; "deep devotion to duty", "distinguished himself in a variety of games", "will make an ideal teacher" were some of the things said of him in a short report which their Lordships have seen. In 1957/8 he completed satisfactorily a course of training at the Teachers College, Penang, passing in a number of subjects which included the national language, physical education and history. He entered the education service as a teacher, and taught for five years (1960-65) at the Abu Bakar secondary school, Temerloh. He showed himself a good organiser, efficient in the class-room and outstanding outside, particularly in games and physical education. In 1962 he went on a year's specialist course in physical education, in which he did well.

On leaving Temerloh, he worked for and obtained a Bachelor of Arts (Honours) degree in history. He was now a division I officer in the service and clearly marked out for promotion. In 1969 he was taken on to the teaching staff of the Victoria Institution, Kuala Lumpur, described in evidence as one of the premier schools in Malaysia. He impressed his headmaster as a "more than average good teacher". He did not, however, remain there very long: for on October 7, 1969 he was appointed headmaster of the Sekolah Tunku Besar school at Tampin where before his accident he proved himself an energetic, popular and successful headmaster. The Director of Education for Negri Sembilan spoke highly of him, and praised particularly his work in the intensive building programme then being undertaken at the school.

The career position of the appellant immediately before his accident is set out in the judgment of the Federal Court. He was an unconfirmed education officer (division I), having been so appointed, subject to a probationary period, with effect from September 5, 1969. To obtain confirmation, without which there was no prospect of promotion, he would have to pass the prescribed examinations in Bahasa Malaysia, i.e. the national language. There were four papers:– (1) essay and letter writing; (2) grammar; (3) history and culture; and (4) called a paper, but in fact an oral examination. The examinations are held twice a year, in June and December. During his 3 years of probation, therefore, he would have six opportunities of taking his four "papers".

The only attempt the appellant ever made during the 3 years, September 1969 to September 1972, to pass any of the examinations was in June 1972 when he sat for papers (1) and (2), passed in (1) but failed in (2). In September 1972 the Ministry of Education extended his period of probation for a further year, warning him that he must pass the remaining three papers during the year. He did

not sit in December 1972. He suffered his accident in May 1973 one month before his last opportunity to take them before his period of probation expired. He has not succeeded in passing the examinations since the accident. He has now no prospect of confirmation or promotion.

The accident caused a number of injuries of which far the most serious was an injury to the brain. The brain damage was described as "minimal" but the neuro-surgeon who treated him commented that the brain is a very sensitive organ, and that even slight damage can have serious consequences. The trial judge found – and there has been no challenge to his finding – that after the accident there was a marked change in his personality, and that from being an active headmaster he had become depressed, uncomfortable, restless, not the same man as he was before the accident.

The trial judge, after considering the evidence, accepted the submission that in all probability the appellant would have passed the remaining three papers in the national Bahasa Malaysia language which were necessary for his chances of promotion, had he not suffered the accident. He also found – surely correctly – that after the accident the appellant was in no position to take successfully any of the papers, thereby losing all chance of further promotion.

The Federal Court disagreed. They were impressed by the appellant's failure to take his examinations during the period of his probation, by his lack of success in one of the only two papers he did take, and the lack of any evidence to indicate that he had made any preparations to take the three papers still outstanding when the accident occurred. They rejected the judge's view that but for the accident he would in all probability have passed the examinations.

This, the basic question of fact in the appeal, is a matter of inference. The appellant himself did not give evidence. Their Lordships would not think it just to hold this omission against him: the consequences of his brain injury were such that any evidence he might give would have been unlikely to assist the court. The Federal Court was impressed by his failure to tackle the examinations between September 1969 and May 1973. They thought little of the suggestion that he was too busy at the time to get down to them.

Perhaps the trial judge was too sanguine in his assessment of the appellant's prospects when he opined that in *all* probability he would have passed them. But the Federal Court's view that "the evidence completely negates" the probability that he would goes too far. The balance of probabilities does, in their Lordships' view, tilt in favour of the appellant. It could not be said that there was no chance that he would sit and pass them. And, when one recalls his record of past achievement and distinction, the chance that he would, albeit at the eleventh hour, have made the effort to pass was a real one. And, had he made the effort, he certainly had the capacity, before his accident, to achieve the necessary passes. His academic record (combined with his energy and sense of duty) was such as to support the inference that he would probably have made the effort and succeeded.

The trial judge must, when he came to decide the case, have known a great deal about the appellant. He had the impressive record of his achievements: and he had seen and heard in the witness box some six teachers and officers of the education service speak of his career as a teacher. The dilatoriness of the appellant in sitting the examinations, though matter for criticism, is not a sufficient ground for disturbing a finding that on the balance of probability he would have passed.

The judge awarded $112,722.80, calculated in accordance with current tables for computing the capital value of periodic payments to be made over a period of years which their Lordships were told were in use by Bench and Bar in Malaysia at the time of trial. Since no challenge has been made in this appeal to the tables as a calculation, their Lordships assume, without deciding, their relevance and reliability. The judge took $1,000 a month as the loss of earnings he would have earned had he passed the examinations and 13 years from the date of accident as the period of loss.

The Federal Court criticised the period of 13 years. The criticism of the period appears to their Lordships to be well-founded. The trial judge appears to have thought that the appellant would have been promoted to what is known as the "Superscale G" salary scale very soon, if not immediately, after being confirmed in the service by passing his examinations. But this was not the evidence. Confirmation did not automatically mean promotion. He might have had to wait 8, 10 or

even 12 years before reaching the Superscale. Possibly, he might never be promoted.

Nevertheless the Federal Court's view that "promotion to Superscale G was not even a possibility at the time of the accident" is, as their Lordships have already explained, not to be sustained in the light of the evidence and the judge's finding of the prospects of the appellant passing his examinations. The Federal Court, therefore, while correct in altering the amount of the judge's award, was wrong to allow the appellant nothing in respect of loss of earnings prior to his expected date of retirement.

The appellant has, of course, remained in receipt of his pre-accident earnings. The loss claimed relates only to increases he could have hoped to gain as a result of promotion. He was 37 years old at date of accident: his age of retirement would have been 55. If one accepts as reasonable the judge's assessment that promotion would have brought the appellant a further $1,000 a month but as quite unreal his finding that he would probably have received this extra monthly sum either at once or very soon (being the only possible justification for a multiplier of 13 years), it becomes necessary to make a reasonable assessment upon the basis of all the evidence, which includes the appellant's success in his chosen profession before the accident as well as the likely delays in the promotion process. Their Lordships think that a third of the judge's award in respect of this item would be reasonable. Accordingly, under the judge's item (b), their Lordships, allowing the appeal against the Federal Court's total rejection of any award, assess the loss at $37,600.00.

The Federal Court and the trial judge were agreed in holding that the appellant was entitled to an award in respect of loss of post-retirement earnings, but differed as to the amount of damages to be awarded. The trial judge awarded in respect of earnings (including the pension factor) a sum of $60,908.00 and for loss of gratuity on retirement $10,000.00. The Federal Court held that nothing was due in respect of the pension factor or the gratuity but did make an award in respect of loss of earnings from a post-retirement job, which they considered he might have held for a period of 5 years; their figure was a sum of $31,172.23 (calculated in accordance with the tables to which reference has already been made). After a full consideration of the evidence, their Lordships have reached the conclusion that the trial judge grossly exaggerated the present capital value of these distant benefits lost as a result of the accident. None of them would have materialised until after the appellant had reached the age of 55 and there was an element of uncertainty not only as to the prospect of promotion but as to the chances of obtaining employment. Nevertheless, there is a further loss here, however difficult it is to assess. Without entering into detailed calculation their Lordships are satisfied that the Federal Court's figure for loss of post-retirement benefits is not unreasonable, even if account be taken (contrary to the Federal Court's view) of a possible loss of some pension and gratutity, as well as of a job. Their Lordships do not, therefore, consider that they would be justified in disturbing the Federal Court's figure for this item of future loss.

For these reasons their Lordships would allow the appeal and substitute for the Order made by the Federal Court the following:—

(a) General damages (pain, suffering and loss of amenities)	$ 70,000.00
(b) Loss of pre-retirement earnings	37,600.00
(c) Loss of post-retirement earnings	31,172.23
(d) Loss of gratuity, as an item separate from (c)	nil
(e) Special damages for transport	500 00
Total	$139,272.23

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed and that judgment should be entered for the appellant for $139,272.23 and interest. The respondents must pay the appellant's costs of the appeal to the Federal Court and before the Board.

Appeal allowed.

Solicitors: *Le Brasseur & Bury; Philip Conway Thomas & Co.*